



Giteru v Njogu; John (Interested Party) (Environment and Land Appeal E001 of 2021) [2023] KEELC 16674 (KLR) (21 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16674 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E001 OF 2021
EC CHERONO, J
MARCH 21, 2023**

BETWEEN

JOSEPH KITHAKA GITERU APPELLANT

AND

JAMES NJOGU RESPONDENT

AND

MORRIS MUTUTA JOHN INTERESTED PARTY

RULING

1. By a Notice of Motion application brought under the provisions of sections 1A,1B, 3A of the *Civil Procedure Act* and dated February 1, 2022, the appellant seeks the following orders;
 - a. Spent
 - b. The county Land Registrar Kirinyaga County is directed to rectify the register by cancelling the names of James Njogu Kathenge holder of National Identity Card Number xxxx and Morris Mututa John holder of national identity card number xxxx and replacing with that of Joseph Kithaka Giteru.
 - c. The court does grant an order compelling the land registrar to execute all the necessary documents to facilitate the registration of the appellant of the suit property Kabare/gachigi/938.
 - d. The honourable court does issue an order directing the land registrar to dispense with the production of the old title deeds in respect to land parcel number Kabare/gachigi/938.



- e. The honourable court be pleased to dispense with the production of national identity cards, personal identification number, passport size photographs for Morris Mututa John holder of national identity card number xxxx.
 - f. The honourable court be pleased to issue an injunction restraining the respondents whether by themselves, their servants, agents or anyone acting on their behalf from wasting, damaging, charging, transferring, further construction, alienating or otherwise interfering with the plaintiff's right in any way on land parcel number Kabare/gachigi/938 or in any way pending hearing and determination of this application.
 - g. Costs of the application.
2. The application is supported by the grounds on the face of the motion and the applicant's affidavit sworn on even date. The gist of this application is that this court allowed his appeal vide the judgement delivered on 21/1/2022 and upon applying for a certificate of official search, he found the parcel had been registered in the interested party's name during the subsistence of this appeal despite the grant of stay orders by this court.
 3. The interested party filed his replying affidavit sworn on February 7, 2022 where he depones that he was not a party to the suit and that no orders can therefore apply against him as it would amount to condemning him unheard. He depones that the orders sought in the application seeking for cancellation of his title deed are contrary to the Land Act and the Land Registration Act. He avers that the orders sought are substantive in nature and cannot be granted through a notice of motion.
 4. The interested party depones that the appellant entered into his land in January, 2022 and destroyed his crops whereupon he filed Gichugu SPMCC No. 4 of 2022 and the instant application is therefore calculated to pre-empt the suit.
 5. The parties agreed by consent to canvass the application by way of written submissions. All the parties complied.
 6. The appellant framed the following issues for determination;
 - a. Whether the appellant/applicant is entitled to the orders of interlocutory injunction sought in prayers 2 and 6 of the motion.
 - b. Who shall bear the costs of the application.
 7. On the first issue, it is submitted that the applicant has established the conditions set out in the celebrated case of *Giella v Cassman Brown Co Ltd* (1973) EA 358. The appellant further submits that the he has a high probability of success and that it is in the interests of justice that the application is allowed. He submits that the developments on the land are at risk of being destroyed and that he risks starving since he has nowhere else to cultivate and that the respondent has continued destroying his crops.
 8. On his part, the respondent submits that the application contravenes the provisions of Order 9 rule 9 since the applicant did not seek leave of the court to prefer the application having been previously represented by counsel. That the consent filed in court on March 2, 2022 between the applicant and counsel cannot operate retrospectively.
 9. He further depones that after the delivery of judgement in this matter, he lodged a notice of appeal against the judgement in the Court of Appeal and is in the process of obtaining orders for stay of execution. On the status of registration of the parcel, he submits that the land was lawfully transferred



to a third party after the orders of stay lapsed. That the parcel is the subject of a pending suit between the interested party and the applicant.

10. On his part, the interested party submits that he was not party to the suit and executing the orders emanating therefrom is tantamount to condemning him unheard contrary to the provisions of article 50 (1) of the Constitution and violate his constitutional right to property. He submits that the process of obtaining title to the property was proper and in accordance with the provisions of sections 26(1) and 80 of the Land Registration Act, 2012. He further submits that no allegations of fraud have been proved against him as he is an innocent purchaser for value without notice.
11. He submits that the appellant did not serve the orders in this suit on the interested party thus the institution of the suit in Gichugu Magistrate's court. He submits that the appellant entered upon the land and destroyed barbed wire fence and other crops.

Analysis and determination.

12. After careful consideration of the application, the responses thereto, the submissions and the relevant law, this court is of the view that the main issue arising for determination is whether the application is merited.
13. It is common ground that this court delivered its judgement in this matter in which it allowed the appeal and reversed the learned trial magistrate's findings. It is also freely admitted by the respondent that at the time of transferring the parcel to the interested party and the subsequent registration, the appeal herein was pending determination though his explanation was that the orders of stay given by this court had lapsed. To date, the judgement by this court has neither been set aside nor orders stayed.
14. Going back to the record, it is not in dispute that this court delivered a ruling in this matter granting the applicant 12 months stay of execution from September 20, 2019. This therefore means that the order lapsed around September 20, 2020 and there is no evidence that the orders were extended after the said date. Perusing the interested party's reply to the instant application, the certificate of official search and the green card annexed thereto shows that the interested party was registered as the proprietor on 25/11/2020 approximately 2 months after the lapse of the orders.
15. The question that arises then is whether it was proper for the respondent to transfer the suit property during the pendency of the suit despite the lapse of the orders? In the alternative, whether the transfer was calculated to defeat the ends of justice? It is explicitly clear that the transfer renders the appeal nugatory since the appellant cannot now enjoy the fruits of his appeal because the parcel has been transferred to a third party who was not a party to the suit both in the subordinate court and at this court and the orders cannot therefore be executed against him. However, there is the common law principle of *lis pendens* which underscores the need to preserve the subject matter of the suit during the pendency of litigation as was stated in Mawji v US International University & another [1976] KLR 185 that:

.....it is a doctrine equally recognized by common law. It is based on the expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matter before the court and in the general interest of public policy and good effective administration of justice

It prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other



16. Similarly, in *Re estate of Solomon Muchiri Macharia* (2016) eKLR, it was held;

The principle of lis pendens is in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendent lite is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of title acquired during the pendency of litigation.

17. Section 1A, 1B, 3A and 63(e) *CPA* provides the overriding objectives which empowers this Honourable court to grant orders that would prevent the processes of the court from being abused and or give orders that would ensure that justice is served. It is common knowledge that courts of law do not issue orders in vain as wanton disobedience of such orders would lead to disorder and anarchy in the society.

18. The agreement annexed to the interested party's reply shows that the interested party purchased the suit land for Kshs 1 Million which amount he says he paid without notice of fraud by the respondent in the process of obtaining title. It is true that at the time of the purported purchase, the instant appeal was active in court. The interested party denies knowledge of the existence of this appeal and that is the reason he instituted another suit in Gichugu magistrate's court against the appellant for eviction orders and the pleadings in that matter have been annexed to the interested party's reply.

19. As to whether the orders should operate against the interested party despite not being a party to this suit, this court comes to the irresistible conclusion that the respondent's acts of disposing of the suit during the pendency of the appeal was a scheme calculated to remove the suit parcel of land from the reach of the court. The interested party cannot therefore play innocent and claim that he had no knowledge of the suit when the green card shows that there had been an active suit touching on the parcel.

20. Disallowing the application herein is akin to allowing the respondent and the interested party to get away with their mischief. They will have gotten away with the appellant's property contrary to the public policy and the fair administration of justice. The actions by the respondent and the interested party are mischievous and were clearly intended to subvert the course of justice and render the orders of this court to naught.

21. In any case, there is an agreement on record indicating the purchase price and this is the sum the interested party can recover from the respondent ultimately.

22. Having carefully considered the application and the responses thereto as well as the submissions, this court is satisfied that the Notice of Motion dated February 1, 2022 is merited and the same is hereby allowed in terms of prayers NO.2, 3, 4, 5, & 6, thereof.

23. Both the respondent and the Interested party shall bear the costs of the application.

24. Orders accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 21ST DAY OF MARCH 2023

HON. E.C. CHERONO

ELC JUDGE

In the presence of;

1. Mr. Asimwe H/B for Magee for the Interested party.



2. Respondent/advocate-absent

3. Applicant--absent

4. C/A Joy

